American Bar Association
www.supremecourtpreview.org

No. 08-295

IN THE
Supreme Court of the United States

THE TRAVELERS INDEMNITY CO. ET AL.,
Petitioners,
v.
PEARLIE BAILEY ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* RESOLUTE MANAGEMENT INC. IN SUPPORT OF PETITIONERS

BRIAN G. SNOVER
VICE PRESIDENT AND GENERAL COUNSEL
BERKSHIRE HATHAWAY GROUP REINSURANCE DIVISION
100 First Stamford Place
Stamford, CT 06902
(203) 363-5211

PAUL J. WATFORD*
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071
(213) 683-9100

Counsel for *Amicus Curiae* Resolute Management Inc.

February 2, 2009 *Counsel of Record

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. BANKRUPTCY COURTS HAVE THE POWER, WHEN APPROPRIATE, TO ENJOIN CLAIMS THAT DO NOT DIRECTLY AFFECT THE *RES* OF THE BANKRUPTCY ESTATE 3

II. THE VALIDITY OF THE BANKRUPTCY COURT'S JUDGMENT IS NOT SUBJECT TO COLLATERAL ATTACK. 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Camp v. Boyd,
229 U.S. 530 (1913) 7

Chicot County Drainage Dist. v. Baxter State Bank,
308 U.S. 371 (1940) 2, 10, 11

Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & P.R. Co.,
294 U.S. 648 (1935) 5, 8

Hecht Co. v. Bowles,
321 U.S. 321 (1944) 5

Kontrick v. Ryan,
540 U.S. 443 (2004) 3, 10

MacArthur Co. v. Johns-Manville Corp.,
837 F.2d 89 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988) 10

Matsushita Elec. Industrial Co. v. Epstein,
516 U.S. 367 (1996) 2, 7, 8

Porter v. Warner Co.,
328 U.S. 395 (1946) 7

Skillern's Executors v. May's Executors,
10 U.S. 267 (1810) 10

Steelman v. All Continent Corp.,
301 U.S. 278 (1937) 8

TABLE OF AUTHORITIES
(continued)

Page

Stoll v. Gottlieb,
305 U.S. 165 (1938) 2, 10, 11

United States v. Energy Resources Co.,
495 U.S. 545 (1990) 6

United States v. Noland,
517 U.S. 535 (1996) 6

Wal-Mart Stores, Inc. v. VISA U.S.A., Inc.,
396 F.3d 96 (2d Cir. 2005) 8

STATUTES

11 U.S.C. § 105(a) 5, 6, 8

11 U.S.C. § 524(g) 1

11 U.S.C. § 1123(b)(6) 5, 8

28 U.S.C. § 157 3

28 U.S.C. § 157(a) 4

28 U.S.C. § 157(b)(2)(L) 2, 5

28 U.S.C. § 1334 3

28 U.S.C. § 1334(a) 4

28 U.S.C. § 1334(b) 2, 4

INTEREST OF THE *AMICUS CURIAE*[1]

Resolute Management Inc. is the administrative arm of the Berkshire Hathaway Insurance Group's run-off operation. The primary business activity of the run-off operation is the assumption of other insurers' liabilities arising from their discontinued lines of business, spanning in some cases decades of historical underwriting activity. The long-tail insurance liabilities assumed under these transactions include liabilities related to asbestos exposure, and the resolution of a material sum of those liabilities has been in the context of bankruptcy proceedings, where an important component of the consideration underlying the insurers' settlements has been the protection afforded by channeling injunctions like the one issued by the bankruptcy court in this case, and similar injunctions issued by bankruptcy courts in subsequent cases under 11 U.S.C. § 524(g). The finality afforded by those settlements, and the reliability of the protection promised to the settling insurers as part of those settlements, are important aspects of Resolute's past and future business activities.

SUMMARY OF ARGUMENT

1. This case does not raise an issue of "subject matter jurisdiction," as the Second Circuit erroneously assumed. The bankruptcy court plainly

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

had subject matter jurisdiction over the "civil proceeding" in which the challenged injunction was issued, because the injunction was an essential component of settlements resolving entitlement to the bankruptcy estate's most valuable asset, and those settlements in turn were essential to confirmation of the plan of reorganization for Johns-Manville Corporation ("Manville"). *See* 28 U.S.C. §§ 157(b)(2)(L) and 1334(b). Whether, in the course of that proceeding, the bankruptcy court could grant injunctive relief covering claims that do not "directly affect the *res* of the bankruptcy estate" (Pet. App. 31a) is a question concerning the proper scope of a bankruptcy court's equitable powers, not one of "subject matter jurisdiction." Granting such relief fell well within the scope of the bankruptcy court's equitable powers under sections 105 and 1123 of the Bankruptcy Code, and the injunction in question is a familiar form of equitable relief granted in connection with approval of global settlements. *See, e.g.*, *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 381-82 (1996).

2. Whether framed as an attack on the bankruptcy court's subject matter jurisdiction or an attack on the scope of the court's equitable powers, Respondents' challenge to the validity of the injunction should not be entertained. The injunction at issue is embodied in the bankruptcy court's judgment confirming Manville's plan of reorganization. That judgment became final more than 20 years ago, and under this Court's longstanding precedent is not open to collateral attack, even on the ground that the bankruptcy court lacked subject matter jurisdiction to issue the injunction. *See, e.g.*, *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 375 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938).

Permitting a challenge of this sort to proceed, two decades after the time for direct appeal has passed, would render virtually any settlement embodied in a judgment confirming a plan of reorganization vulnerable to being unwound, long after parties both inside and outside the bankruptcy proceedings have taken actions that cannot be reversed in reliance on the presumed validity of the judgment. The rule barring collateral attacks on civil judgments is designed to protect precisely these interests in finality and repose.

ARGUMENT

I. BANKRUPTCY COURTS HAVE THE POWER, WHEN APPROPRIATE, TO ENJOIN CLAIMS THAT DO NOT DIRECTLY AFFECT THE *RES* OF THE BANKRUPTCY ESTATE.

In deciding whether the bankruptcy court had the authority to issue the injunction challenged here, there are two separate, analytically distinct questions to be answered, which the Second Circuit conflated. The first is whether the bankruptcy court had "subject matter jurisdiction" over the proceeding in which the injunction was issued; the second is whether the bankruptcy court's broad equitable powers authorized it to grant the type of injunctive relief involved here.

Analysis of the first question is straightforward. "Only Congress may determine a lower federal court's subject-matter jurisdiction," and "Congress did so with respect to bankruptcy courts in Title 28" – specifically, 28 U.S.C. §§ 157 and 1334. *Kontrick v. Ryan*, 540 U.S. 443, 452-53 (2004). Section 1334

grants district courts original and exclusive jurisdiction over "all cases under title 11," and original jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a), (b). Bankruptcy courts have jurisdiction over the same classes of cases and proceedings pursuant to section 157. 28 U.S.C. § 157(a).

Although the Second Circuit grounded its decision on a supposed lack of "subject matter jurisdiction" (Pet. App. 35a), it never analyzed the text of the controlling statutes. The text of section 1334 makes clear that analysis of subject matter jurisdiction occurs at the level of "civil proceeding," not at the level (as the Second Circuit erroneously assumed) of the particular *remedy* afforded in the course of a proceeding. Thus, the relevant question here is whether the bankruptcy court had subject matter jurisdiction over the civil proceeding in which the challenged injunction was issued; if it did, no further analysis is required to determine whether the court had "subject matter jurisdiction" to grant the specific form of equitable relief awarded.

The bankruptcy court unquestionably had subject matter jurisdiction over the "civil proceeding" in which the challenged injunction was issued. The injunction was an essential component of settlements that resolved a dispute between Manville and its insurers over entitlement to the proceeds of Manville's insurance policies. Pet. App. 8a-9a. The bankruptcy court had subject matter jurisdiction over that dispute because the insurance policies "were the bankruptcy estate's most valuable asset." *Id.* at 8a. The settlements, in turn, were the "cornerstone" of Manville's plan of reorganization (*id.* at 44a), and the

bankruptcy court's injunction was therefore "embodied in the 1986 Confirmation Order." *Id.* at 9a. The confirmation of Manville's reorganization plan was a core proceeding "arising in" or "arising under" a case under Title 11. *See* 28 U.S.C. § 157(b)(2)(L).

Whether, during the course of that proceeding, the bankruptcy court had the power to enjoin the claims at issue is a separate question. But it is assuredly not a question of "subject matter jurisdiction." It is instead a question concerning the scope of a bankruptcy court's equitable powers, and in particular (as relevant here) the powers conferred by sections 105 and 1123 of the Bankruptcy Code. Section 105 authorizes bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title" (11 U.S.C. § 105(a)), and section 1123 provides authority of a similar nature with respect to the court's approval of a plan. 11 U.S.C. § 1123(b)(6) (a plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title").

When construing the scope of a bankruptcy court's equitable powers (and the authority of equity courts generally), this Court has emphasized the breadth and flexibility of that authority. *See, e.g.*, *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case."); *Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & P.R. Co.*, 294 U.S. 648, 675-76 (1935). When exercising their authority under sections 105(a) and 1123(b)(6), bankruptcy courts may, when appropriate, grant

relief deemed "necessary for a reorganization's success" even if such relief is not expressly authorized elsewhere in the Bankruptcy Code. *United States v. Energy Resources Co.*, 495 U.S. 545, 549, 551 (1990). This Court's decisions reflect the view that, so long as they "have not transgressed any limitation on their broad power," bankruptcy courts are free to be innovative in fashioning appropriate forms of equitable relief. *Id.* at 551.

This Court has made clear, of course, that in exercising their "broad power" under section 105(a), bankruptcy courts may not grant relief that is inconsistent with an explicit command in the Bankruptcy Code. *United States v. Noland*, 517 U.S. 535, 540-41 (1996). The Second Circuit did not identify any provision of the Code, however, that purports to restrict a bankruptcy court's authority to issue injunctive relief in favor of non-debtors who contribute substantial funds to the estate as part of a settlement with the debtor, pursuant to confirmation of a consensual plan of reorganization. Nor did the court identify any provision of non-bankruptcy law that could be deemed inconsistent with the granting of such relief.

The only question raised by the Second Circuit's opinion is whether a bankruptcy court may approve a settlement enjoining claims that it would not independently have had subject matter jurisdiction to adjudicate. *See* Pet. App. 18a (asserting, without analysis, that a bankruptcy court lacks authority "to enjoin claims over which it had no jurisdiction"). Petitioners have persuasively shown why the claims at issue here would independently fall within the scope of a bankruptcy court's subject matter jurisdiction. But the Court need not squarely resolve

that issue, because equity courts have long adjudicated claims related to the controversy that brought the case into equity, even though those claims would not independently have been within the court's jurisdiction, when necessary to "do complete rather than truncated justice." *Porter v. Warner Co.*, 328 U.S. 395, 398 (1946). As this Court stated in *Camp v. Boyd*, 229 U.S. 530 (1913), "a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that otherwise would not be within the range of its authority." *Id.* at 552; *see also Porter*, 328 U.S. at 398 ("the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances").

Thus, under its inherent powers as a court of equity, the bankruptcy court had ample authority to approve a settlement of a dispute that plainly was within its subject matter jurisdiction – here, the dispute over entitlement to a valuable asset of the estate – even if the ancillary injunctive relief it afforded reached claims that would not independently have been within its jurisdiction. That the granting of such relief in the context of settlement is by no means a novel exercise of equitable authority is confirmed by this Court's decision in *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367 (1996). There, the Court held that a state chancery court could validly approve a class settlement that released claims within the exclusive jurisdiction of the federal courts, notwithstanding the state court's lack of subject matter jurisdiction to adjudicate those claims

on the merits. *Id.* at 381-82.[2] As a result, even if the injunction challenged here were regarded as effecting a "release" of the enjoined claims (which is not the case because the injunction instead channeled those claims to the Manville Trust for liquidation), the equitable power exercised by the bankruptcy court would tread no new ground.

At bottom, then, in this case the propriety of granting equitable relief to enjoin claims that do not "directly affect the *res* of the bankruptcy estate" (Pet. App. 31a) ultimately turns on whether such relief was in fact "necessary" and "appropriate," as sections 105(a) and 1123(b)(6) require. But that "presents a question addressed not to the power of the court but to its discretion" (*Continental Ill. Nat'l Bank*, 294 U.S. at 677), and there is no claim here that the bankruptcy court's discretion "was abused or improvidently exercised if power was not lacking." *Steelman v. All Continent Corp.*, 301 U.S. 278, 288 (1937). The bankruptcy court's extensive findings, affirmed by the district court and left undisturbed by the Second Circuit, document both the necessity of the injunction to Manville's successful reorganization and its appropriateness in terms of scope and effect. *See, e.g.*, Pet. App. 170a-171a. The Second Circuit's decision should therefore be reversed.

---

[2] The same rule prevails in federal courts. *See Wal-Mart Stores, Inc. v. VISA U.S.A., Inc.*, 396 F.3d 96, 107 (2d Cir. 2005) ("The law is well established in this Circuit and others that class action releases may include claims not presented and even those which *could not have been presented* as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct.") (emphasis added).

II. THE VALIDITY OF THE BANKRUPTCY COURT'S JUDGMENT IS NOT SUBJECT TO COLLATERAL ATTACK.

Regardless of how Respondents' challenge is framed – whether as an attack on the bankruptcy court's subject matter jurisdiction or as an attack on the scope of the court's equitable powers – the Second Circuit's decision should be reversed for another reason: The injunction challenged here is embodied in a judgment that became final more than 20 years ago, and the validity of that judgment may not be collaterally attacked in this proceeding.

The "jurisdictional" challenge Respondents have raised does not contest the bankruptcy court's jurisdiction to issue the Clarifying Order in 2004. All agree, including the Second Circuit, that the bankruptcy court "had continuing jurisdiction to interpret and enforce its own 1986 orders." Pet. App. 17a. The bankruptcy court also found, as a factual matter, that the terms of the original injunction cover the claims at issue in this case, because those claims necessarily "arise out of" and are "related to" the Manville insurance policies issued by Petitioners. *Id.* at 173a. The district court affirmed that finding and the Second Circuit left it undisturbed. *Id.* at 18a, 32a. Thus, as this case comes to the Court, the only "jurisdictional" challenge raised is to the bankruptcy court's subject matter jurisdiction in 1986 to issue the injunction in the first place.

That challenge should not be entertained because it represents an impermissible collateral attack on a judgment that has long since become final. The bankruptcy court's injunction was embodied in the order confirming Manville's reorganization plan, which constitutes the relevant judgment in this case.

The validity of the injunction was challenged on appeal by a Manville distributor, which claimed that the bankruptcy court lacked "jurisdiction" to enjoin it from prosecuting its own claim for coverage under the Manville insurance policies. The Second Circuit squarely rejected that challenge (*MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988)), and upon denial of *certiorari* the judgment became final.

This Court has long held that a final judgment in a civil action is not open to collateral attack in subsequent proceedings, even on the ground that the court rendering the judgment lacked subject matter jurisdiction. The Court first announced this rule in *Skillern's Executors v. May's Executors*, 10 U.S. 267, 268 (1810), and has adhered to that rule in an unbroken line of decisions that extends to the present day. *See, e.g.*, *Kontrick*, 540 U.S. at 455 n.9 ("Even subject-matter jurisdiction, however, may not be attacked collaterally.") (citing *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U.S. 552 (1887)).

The rule barring collateral attacks on final judgments applies with full force to judgments entered in bankruptcy proceedings. In *Stoll v. Gottlieb*, 305 U.S. 165 (1938), the Court held that a party who unsuccessfully challenged subject matter jurisdiction in the bankruptcy court could not collaterally attack the validity of the bankruptcy court's judgment in a subsequent state court action. *Id.* at 172. And in *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940), the Court refused to permit a collateral attack on a bankruptcy court's judgment where the parties involved in the original proceeding had an opportunity to challenge the court's jurisdiction, even though no such

challenge was actually litigated there. *Id.* at 375 ("these bondholders, having the opportunity to raise the question of invalidity, were not the less bound by the decree because they failed to raise it").

Under these cases, the validity of the bankruptcy court's injunction may not be collaterally attacked on the ground that the court lacked subject matter jurisdiction in 1986. The judgment incorporating that injunction has been final now for more than 20 years, and numerous parties – both inside and outside the bankruptcy proceedings – have taken actions over the past two decades in reliance on the presumed validity of that judgment. To afford any measure of stability, rules governing the finality of judgments must provide a clear point beyond which matters deemed settled may no longer be contested, even at the risk that review of perceived errors will be foreclosed. "It is just as important that there should be a place to end as that there should be a place to begin litigation." *Stoll*, 305 U.S. at 172.

The interests in finality and repose protected by the rule barring collateral attacks are especially strong in this case. The injunction entered by the bankruptcy court was an integral part not only of the global settlement concerning Manville's insurance assets, but also of the broader global settlement that Manville's consensual plan of reorganization represents. Pet. App. 8a-9a. The reorganization could not have proceeded absent creation of the Manville Trust, and the Manville Trust could not have been created without the funds Manville's insurers agreed to contribute in exchange for "a full and complete release of liabilities that were in any way related to or based on Manville." *Id.* at 134a. The bankruptcy court expressly noted that, without

such protection, Petitioners would not have settled. *Id.* Yet the effect of the Second Circuit's ruling is to invalidate the consideration Petitioners expected to receive in return for the funds they contributed, even though it is now impossible to return the parties to the *status quo ante*.

The Second Circuit's ruling, if permitted to stand, would cast doubt on the finality of virtually any settlement embodied in a judgment confirming a plan of reorganization. If the judgment in this case is not treated as final, two decades after its affirmance, when literally hundreds of thousands of claimants have been paid billions of dollars from a trust whose very existence depended on the validity and finality of that judgment, it is difficult to imagine a bankruptcy court judgment that would be safe from collateral attack. Allowing such attacks would thwart the legitimate reliance interests of insurers who, like Petitioners, have reached settlements (and paid settlement funds) in past bankruptcy proceedings in the belief that they had negotiated "global finality" (Pet. App. 172a), thereby undermining the incentive of similarly situated parties to settle in future proceedings. It would also thwart the legitimate reliance interests of parties who, like *amicus curiae*, have assumed the liabilities of insurers in the run-off market in exchange for a fixed sum, based on the assumption that the settlements reached by those insurers in bankruptcy proceedings are valid and final.

The Court should adhere to its longstanding rule barring collateral attacks of this sort, and hold that Respondents' challenge to the bankruptcy court's subject matter jurisdiction is foreclosed.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

BRIAN G. SNOVER
VICE PRESIDENT AND
GENERAL COUNSEL
BERKSHIRE HATHAWAY GROUP
REINSURANCE DIVISION
100 First Stamford Place
Stamford, CT 06902
(203) 363-5211

PAUL J. WATFORD*
MUNGER, TOLLES &
OLSON LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071
(213) 683-9100

Counsel for *Amicus Curiae* Resolute Management Inc.

February 2, 2009 *Counsel of Record